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THE HEARSAY RULE APPLIED TO EXTRA-JUDICIAL CONFESSION OF DECEASED THIRD PERSON.

The majority opinion in Donnelly v. United States, 33 Sup. Ct. 449, shows that plaintiff in error was convicted of murder upon circumstantial evidence. This evidence also tended to exclude the theory that more than one person participated in the crime. Accused offered testimony for the purpose of showing that one Joe Dick had confessed that he did the killing. By way of foundation for the offer, defendant showed at the trial that Dick was then dead; that he lived in the vicinity at the date of the crime; that there were human tracks leading in the direction of a camp where Dick was stopping at the time, rather than in the direction of the home of accused, and beside the track there was an impression of a person sitting down, which circumstance was supposedly relevant to Dick having shortness of breath because he was a sufferer from consumption. The offer was rejected and this ruling sustained, Justices Holmes, Lurton and Hughes dissenting.

This holding is based squarely on the rule of the inadmissibility of hearsay evidence, except as coming under well-defined exceptions, within which this offer was held not to come. We admire, generally, a principle being enforced to its logical extreme, but whether or not a rule of evidence should be applied with the same vigor seems to us debatable.

Justice Holmes, the writer of a brief dissenting opinion, which is concurred in by the other two justices above named, said: "The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the cases of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations which would be let in to hang a man; and when we surround an accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact, that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length. 2 Wigmore, Ev. §§ 1476, 1477."

We have not consulted Mr. Wigmore's reasons and going upon our own line of thought, we will be gratified either by finding some confirmation or that we have supplied additional reasons to those urged by Mr. Wigmore for his conclusion so greatly responsive, as we think, to the American view of justice.

The majority opinion speaks of there being "in this country a great and practically unanimous weight of authority in state courts against admitting evidence of confessions of third parties made out of court and tending to exonerate accused." To this are cited, as some of the cases from fifteen states, possibly one hundred in number. Out of these it refers to three cases only in which "the alleged declarant was shown to be deceased at the time." It is not even alleged as to any of the others that there was shown any reason why the declarant, impliedly admitted to be alive, could not have been brought into court and made to convert his supposed extra-judicial confession into a confession in open court. Therefore, the array of authority "precisely in point" is not, on the face of this opinion, so very formidable.

In addition there are cited a number of civil cases, with one exception, and an ex-

pression by Chief Justice Marshall, declaring that the rule against hearsay evidence is necessary as otherwise "no man could feel safe in any property." To us this seems a curious barrier against a claim for an exception that goes to the saving of life or liberty. It is conceivable that the rule ought to have a vigor against hearsay admissions that would destroy private right but should not obtain against hearsay confessions that would save private life.

Further than this, our jury system and the rights of jurors to judge for themselves both the law and the fact, squarely are opposed to the rule of exclusion of such evidence. Many of the states declare in decision that the judge is the safe guide of the jury as to the law and forbid him to intimate in the least degree his opinion as to facts. Why, therefore, should the English doctrine, which Judge Holmes seems to say has set the pace for the rulings cited by the majority opinion, control, when it was the absolute duty of an English jury to apply the law laid down by an English judge?

It is true that the safely advisory capacity of an American judge should not be conceived to open wide the door for incompetent evidence, because a jury has the wide power we speak of, but his rulings in regard to rules of evidence, which have grown up from precedents in regard to methods of proof, should be affected by the fact that in criminal cases he may be supplanted by the jury in his view of law, especially when, as Judge Holmes says, in effect, there is a question of excluding a fact of convincing force.

But even in states and under the federal rule, where the jury may not be held so free to disregard the opinion of the judge in respect of the law, the English doctrine should not command unqualified observance, nor decision which has blindly followed it.

Administration of law seems on a more merciful plane here than in England, and allegiance here is different than it used to be, if not now. Subjects here are not subjects like those in England prior to 1776, nor is policy the same. Emanation of power here is from the people and it is inconceivable that they advisedly should will, that the life or liberty of one of them should be taken because of a rule of court shutting out convincing evidence of innocence. The courts, which are the servants of the people, do not need such a harsh rule, in their proper functions. The doctrine of the exclusion of all reasonable doubt as a necessity to convict of crime is opposed to its application. Indeed, it seems to us, that the only theory of justification for its application is that there is a remedy in a way being open for executive clemency.

The existence of this remedy, however, tends, as we think to prove the very reverse. It is applied for in *ex parte* proceedings and the tests to determine the weight of a confession should not be thought so convincing as in a court of justice. A spurious confession could be reserved and more easily imposed on an executive than on a court, where it could be met and challenged and rebutted in all the ways that argument and the rules of evidence supply, witnesses being present to fix the crime upon the accused.

The theory of executive clemency is not to give opportunity to have a conviction set aside when it has been obtained according to due judicial procedure. Therefore, if an extra-judicial confession is not admissible in evidence before a court, it should present no ground for clemency from an executive. But what Governor or President would fail to give it effect, if he believed it to be true? Thus we would have two departments of our government controlled by opposing rules, when but the one end is aimed at. Government is not a system of contradictions.

NOTES OF IMPORTANT DECISIONS

GARNISHMENT—REMEDY TO DETERMINE TITLE TO PROPERTY FRAUDULENTLY CONVEYED.—The breadth of the remedy in garnishment is forcibly illustrated in Potter v. Whiten, 155 S. W. 80, decided by Springfield (Mo.) Court of Appeals.

In this case there was garnishment on execution against defendant, the garnishment being on a bank, with an accompanying notice by plaintiff that he had reason to believe that a deposit account in the bank subject to check of the debtor's wife, was his money and property, and that the making of the deposit in this way was an "attempt to conceal the same and prevent his creditors from reaching the same, particularly plaintiff, a judgment creditor of the husband for more than $1,600. The notice further spoke of the money on deposit being the product of the sale of defendant's property, and placed with garnishee with intent to defraud plaintiff and other creditors fo defendant.

It was claimed that garnishment being purely and strictly a legal proceeding, it had no intendments in its favor, and by it the question of title to property in the hands of a bailee could not be worked out. This position would seem to have much of force in it, if garnishment upon attachment is under statute of the same breadth and effectiveness as upon execution. This is upon the theory that the bond in attachment runs in defendant's favor, and therefore the statute should not be supposed to interfere with another's claim of right or title, especially if he be in apparent rightful possession. *Per contra*, it is to be said, that, if as has been held execution upon a judgment may by levy open up this question, then mesne process should be allowed to go every length that it does. McIntosh & Warren v. Oswosso Carriage & Sleigh Co. (Tex. Civ. App.) 146 S. W., 239; Dickinson v. Harbinson, (N. J.) 72 Atl. 941. Certainly, however, if this can be done, as the Missouri court held, the case is as good an illustration of simplified procedure as one might hope to produce.

The theory of the case is that no tangle for a court of equity to work out is presented, because of the vitiation of the matter by fraud, which leaves no "indefinite contingencies, trust agreements and relations" with any rights the law in bound to respect. This is a very convenient cutting of a Gordian knot, and we are far from saying it is not a lawful cutting; on the contrary, we believe it is.

Himstedt v. German Bank, 46 Ark. 537, holds that there is a distinction as where or not a garnishee had notice at the time of the deposit of its being fraudulent. We see little in this distinction as long as he remains a mere stakeholder. Bingham v. Samping, 26 Va. 340, 67, Am. Dec. 418 holds that a carrier of goods who has made a contract in good faith for carriage could not be summoned as a garnishee of consignor. We see a possible distinction here in the fact that delivery to it is delivery to the consignee. Title has passed to him, and the only remedy against this the books speak of is right of stoppage *in transitu* by the seller. A mere depositary differs from a common carrier.

WAY OF NECESSITY, HOW ACQUIRED AND HOW LOST.

When we speak of a way of necessity, we mean a private way, or an easement over the land of a different person from he who claims the right of way. It is a well recognized principle in law that a man cannot have an easement or right of way over his own land, which is separate and independent from the ownership of the land itself.

Blackstone, in speaking of this kind of an easement,[1] says:

"A fourth species of incorporeal hereditaments is that of ways; or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right; though another be owner of the soil. This may be granted on a special permission; as when the owner of the land grants to another the liberty of passing over his grounds to go to church, to market, or the like; in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company. A way may

(1) Volume 2, page 35.

be also by prescription; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law; for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come to it; and I may cross his land for that purpose without trespass. For when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same."

The following outline is presented by Blackstone. Rights of way have been classified into three kinds.

First: Those arising from necessity. Second: Those created by grant or by reservation in a grant, and Third: Those arising by prescription. This classification, however, relates more particularly to the method in which such a way may be created or come into existence, than to the creation or right of a way itself. Because a right of way by necessity, as it is termed, exists by reason of it being necessary to the proper use of the estate to which it attaches: It has been considered, or at least so considered by writers who are not accurate in the use of their terms, as resting alone upon such necessity, and not upon a grant or implied contract. The better doctrine, however, and one which is conceded to be proper, has been announced by Judge Morton, in the case of Nichols v. Luce,[2] in the following:

"The three different modes of acquiring and holding rights of way, in their origin, resolve themselves into one. The distinction between them relates more to the mode of proof than to the source of title. They are all derived from the voluntary grant of the proprietor of the fee. Prescription presupposes and is evidence of a previous grant. Necessity is only a circumstance resorted to for the purpose of showing the intention of the parties and raising an implication of a grant. And the deed of the grantor as much creates the way of necessity as does the way by grant. The only difference between the two is that one is granted in express words and the other by implication. Quando aliquis aliquid concedit, concedere, videtur et id sine quo res uti non potest. Thus, when a man grants a close inaccessible except over his own land, he impliedly grants a right of passing over that land. The same rule of construction would govern a reservation out of lands granted."

In Barrett v. Taylor,[3] it is said:

"The deed of the grantor as much creates the way of necessity as it does the way of grant. The only difference between the two is, that one is granted by express words and the other only by implication. It is not the necessity which creates the right of way, but the fair construction of the acts of the parties."

Waite, J., in Collins v. Prentice,[4] says:

"Although called a way by necessity, yet in strictness the necessity does not create the way, but merely furnishes the evidence of the real intention of the parties."

The usual example of the case where a way of necessity arises, is similar to that stated by Blackstone. That is, that where a man grants or sells to another, a tract of land which has no method of access thereto, or ingress therefrom, excepting over the remaining lands of the grantor, that a way is granted over such remaining lands to the portion conveyed. This implied grant rests upon the theory that a person would not buy a piece of land, that he could not have access thereto, for without such access the land would be useless, and as people do not buy land except that they may have some use of it, the presumption is conclusive that it was bought upon the assumption that there was a way of ingress to such tract

(2) 24 Pick. 102.

(3) 35 Vt. 52.

(4) 15 Conn. 39.

from some public highway: as such way could only be acquired through the modern method of condemnation over any of the adjoining lands belonging to other persons, it is proper that such right of way should be placed upon the lands of the person who made the conveyance, and it has been held that the mere fact that there might be a way that exists by virtue of the doctrine announced by Blackstone and the text writers, as to the creation and existence of a way of necessity.

While the cases are in accord as to the necessary necessity for such right of way where lands are granted without the right of way being reserved to them or having access to a public highway and that this furnishes a sufficient necessity for a right of way over the remaining lands of the grantor.

The difficulty arises in determining what is a proper necessity in cases where there is some possibly way of reaching the lands conveyed, other than over the remaining lands of the grantor. Some courts, or text writers rather, have laid down the doctrine that it is an indispensable necessity. That is, if it is possible to get out to a highway from the lands conveyed there can be no way of necessity. But generally upon this question the courts realize that it is not possible for them to lay down an absolute rule.

In one case, Hyde v. the Town of Jamaica,[5] it was said, that, "it must be an indispensible necessity which would justify the use of a way of necessity." This case, however, was a case in which the way of necessity was one which was claimed by reason of a bridge being washed away and that there must be shown in such cases, in order to relieve the public authorities from liability, that it was indispensible for the person to cross the same; however, in a recent case in California, Casson v. Cole,[6] it is said:

"A way of necessity arises from the necessity alone, and continues while the necessity exists. Unquestionably appellant had a way of necessity across grantor's ranch until a road was dedicated to his use; but when that was done his right to a way of necessity ceased and it matters not that the old road was more convenient to his purpose, when it ceased to be the right ceased."

As to the necessity required, the following from Lawton v. Rivers,[7] shows the difficulty which the courts have recognized. Rendering the opinion the judge says:

"I do not mean to say that there must be an absolute and irresistible necessity; an inconvenience must be so great as to amount to that kind of necessity which the law requires, and it is difficult and perhaps impossible to lay down, with exact precision, the degree of inconvenience which will be required to constitute legal necessity."

In this case there was a convenient way out by water, and the court refused to recognize the way out in another direction over land. It is not shown in this case, however, that the way out over land at all seasons of the year would have been more valuable or more convenient than that by water way.

In Nichols v. Luce[8] this language is used:

"It is not pretended that the bluff across the defendants' lands is impassable, but only that it is exceedingly difficult to pass it and that it would be much more convenient to the defendants to pass over plaintiff's lands; here is no such necessity as would raise an implication of grant of different way upon different parts of defendants' lot. Convenience even great convenience is not sufficient."

In Ogden v. Grove,[9] it is said:

"Convenience is no foundation for the claim, nor is actual detriments to possession of claimant resulting from necessity of a way through his own property, any

(5) 47 Ver. 451.
(6) 153 Cal. 677.
(7) 2 McCord (S. C.) 445.
(8) 41 Mass. 105.
(9) 38 Pa. 491.

reason to claim it through that of a neighbor."

In Screven v. Gregorie,[10] it is said:

"That great convenience is not sufficient."

In Trask v. Patterson,[11] we find this language:

"No implication of a grant of a right of way can arise from proof that the land could not conveniently be occupied without it; its foundation rests upon necessity."

In Oroke v. Smith,[12] we have:

"*Query*, whether the grant of a way existing defacto can be applied except in cases of strict necessity.

Semble, that claimant of such grant must be required to show that without the way he will be subjected to an expense excessive and disproportioned to the value of his estate or that his estate clearly depends for its appropriate enjoyment on the way, or that some conclusive indication of his grantor's intention exists in the circumstances of his estate."

In Alley v. Carollton,[13] it appeared that the lands were surrounded on one side by the Colorado River, and on the other sides by the remaining lands of the grantor. In passing upon this case, the court says:

"The allegations of the petition, we think, however, may be fairly construed as showing appellant to have been entitled to an enjoyment of a right of way of necessity appurtenant to his land over that of the appellee (grantor), at and previous to the commencement of this suit, which had been obstructed and interfered with by the appellee."

Here there was the recognition of the doctrine that an absolute necessity was not required, for there was nothing to show, but what the Colorado river was navigable and access could be reached in that direction.

The case of Pettinghill v. Porter,[14] is a leading case. Here an instruction to the jury, as follows, was approved:

"That the deed under which the plaintiff claimed, conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in power of the grantor to convey. That it was not enough for plaintiff to prove the way claimed would be convenient and beneficial, but she must also prove that no other way could be conveniently made from the highway to her house, without unreasonable labor and expense. That unreasonable labor and expense means excessive and disapportionate to the value of the property purchased."

It will be observed from the above that the court attempts to lay down a rule as to what may be such inconvenience as will justify the finding of the necessity.

The authorities heretofore cited and quoted from, we believe, represents as near as possible, the various opinions upon this proposition as to what will constitute such a necessity from which it may be presumed that a right of way was intended to be conveyed by the grant of the grantor to the grantee. It is further, we believe, obvious that the courts have not been able to lay down a definite rule. If we should follow those courts that hold that an indispensible necessity is requisite, then we would destroy the doctrine or at least very seriously impair it, that the way rests upon a grant.

And it is probable therefore that the rule laid down in the case of Pettinghill v. Porter, hereinabove quoted from, that a way of necessity would be held to be implied within a grant, where no other way could be conveniently made from the highway to the land in question, without unreasonable labor and expense: and that what would constitute such unreasonable labor and expense would be a labor and expense excessive and disapportionate to the value of the property purchased.

The courts have held that this necessity should be clearly established for the reason that one man's land should not be taken for the benefit of another where the same could

(10) 8 Rich. (S. C.) 158.
(11) 29 Me. 502.
(12) 11 R. I. 259.
(13) 29 Tex. 74.
(14) 8 Allen 1.

not be justified upon the existence of such a condition of facts from which a clear presumption could be implied, that the parties must have intended that some way was to have been included within the original conveyance.

While we think it is clear that the consensus of opinion of the courts is, that the right of way of necessity rests upon grant, yet the courts seem to have drawn a distinction between a right of way of necessity and a right of way by prescription, or express grant, in this: that it is not one of a permanent nature, although it is one running with the land and will pass as appurtenant to the land so long as the necessity exists from which the grant might have been implied.

If it is shown that such necessity exists at the time that the conveyance was made, that will conclusively show a grant; must this strict necessity at all times continue in order that the right of way may not be lost is a question which seems not to be conclusively settled.

In Oliver v. Hook,[15] while not strictly required for a decision of the case under consideration, the court says:

"But this way of necessity is a way of new creation by operation of law and is only provisional for it is brought into existence from the necessities of the estate granted and continues to exist only so long as there may be necessity for its use. If therefore the grantee acquires a new way to the estate previously reached by way of necessity, the way of necessity is extinguished."

In this case it is only held that a way of necessity would pass under the ordinary provisions of a deed, to-wit: that "all and every the rights, privileges, appurtenances and advantages to the same belonging," or that it might pass without such a covenant.

In Pierce v. Selleck,[16] we find this language:

"It is a fallacy to suppose that a right of way of necessity is a permanent right, and the way a permanent way attached to the land itself, whatever may be its relative condition and which may be conveyed by deed irrespective of the continuing necessity of the grantee."

In this case it was sought to retain the old way of necessity merely because it was more convenient to the use of the owner, than a new highway which was laid out along or through the tract. It was not shown that the highway would not be as advantageous to the general use of the premises as the old right of way, but merely it was not as convenient to the use of the owner.

In Holmes v. Seeley,[17] this quotation is used:

"This was strongly exemplified in Holmes v. Goring 2 Bing 76, where it was decided that a way of necessity became extinguished because the party could conveniently reach his lot by means of a close of his own subsequently purchased."

It will be noticed from these quotations that it is generally held that the new way must be as convenient as the old way before it is lost.

Thus we have in Vail v. Carpenter,[18] where it is said:

"A right of way of necessity ceases as soon as the owner of it can have a direct and convenient access over his own land to the place to which the way leads."

Then follows a longer quotation from Holmes v. Goring[19] as follows:

"A way of necessity when the nature of it is considered, will be found to be nothing else than a way by grant but grant of no more than the circumstances which raise the implication required should pass. If it were otherwise this convenience might follow that a party might retain a way over 1,000 yards of another's land when by subsequent purchase might reach his destination by passing over 100 yards of his own.

(15) 47 Maryland 379.
(16) 18 Conn. 324.
(17) 19 Wendell 510.
(18) 80 Mass. 126.
(19) 2 Bing. 76.

A grant therefore arising out of the implification by necessity cannot be carried further than the necessity of the case requires."

The case of New York v. Milner,[20] is a leading case. Here it is said:

"Again the right of way of necessity over the lands of the grantor in a conveyance to favor the grantee and those subsequently claiming the dominant tenement under him, is not a perpetual right of way but only continues so long as the necessity exists, and if the grantee of the dominant tenement, or those claiming under him, should afterwards by purchase or otherwise acquire a convenient way over his own lands to the tenement in favor of which the way of necessity previously existed the way of necessity over lands of the original grantor of such tenement will cease. So if a convenient way to such tenement is subsequently obtained by the owner thereof by the opening of a highway to or through such tenement. A way of necessity only arises upon the implication of a grant and cannot be extended beyond what the existing necessity of the case requires. Such a right is only commensurate with the existence of the necessity upon which the implied grant is founded. When such necessity ceases the right of way also is terminated."

In Porter v. Shuttlefield,[21] this language is used in the syllabus:

"Where a party has a way by necessity over the land of another the easement terminates with the necessity for the same, by reason of the construction of another way affording a reasonably convenient outlet."

We think from the language used by the courts in these various cases, that it may be reasonably inferred that where conditions arise which may make it possible to have an access to a highway in some direction, that this possibility of access would not destroy the right of way unless it be shown that it is one that is as convenient and valuable to the use of the land as was the way of necessity.

While it seems to be the settled opinion that the way of necessity rests upon grant, and that it will pass as an appurtenant to the lands to which it furnishes a way, yet the courts seem to have engrafted upon it a distinction from all other ways that are founded upon a grant, and that is that it is not a perpetual right, but exists only so long as the necessity which created it exists.

Thus in the leading case of New York v. Millner,[22] it is said:

"Again the right of way of necessity over the lands of the grantor in a conveyance in favor of the grantee and those subsequently claiming the dominant tenement under him, is not a perpetual right of way, but only continues so long as the necessity exists."

The same language is substantially found in Palmer v. Palmer,[23] also in Pierce v. Selleck.[24]

This brings up the analogous situation that a grant presumes a consideration and that although the grantee may have paid for something, yet he cannot exercise full ownership and transfer the right to some one else.

For instance, suppose that A should convey a piece of land to B, which was so situated that B would have a right of way of necessity over the lands of A and that B should in turn convey his property to C, who owned adjoining lands that touched a public highway. Then C could, by reason of his ownership of other lands, reach the public highway without being compelled to exercise the way of necessity, which B had over the lands of A, and if the doctrine announced by the courts is to be carried out in its fullest extent, C would be deprived of this right of way for the lands he had purchased out over the lands of A, notwithstand the fact that such right of way might be an exceedingly valuable one and furnish a much better access to the lands

(20) 1st Barb. Ch. 1.
(21) 146 Iowa 512.
(22) 1 Barb. Ch. 1.
(23) 150 N. Y. 139.
(24) 18 Conn. 321.

he had purchased from B than any way would over his remaining lands.

If such be true C would not be willing to pay the full and fair value of the lands which he had purchased from B, if B had no right to convey to him the way of necessity which had been granted to him by A. It seems plain here that B would be unjustly deprived of a right of property which then existed in him.

In a careful examination of the various cases, this phase of the question does not appear to have been passed upon. Of course if the public granted him a new road, it would be fair, provided it was as good as the old way of necessity, to hold that it ceased to exist. So, if he chose to acquire a new way, which was as good, but why then require him to give up for nothing that which he bought and paid for? Must his act be held alone to benefit his grantor? Must he alone be punished because the way was not expressly mentioned in the conveyance?

It seems that there is some room for doubt upon the question whether such a holding would be just or whether it would be followed in all instances. And we are again driven to the conclusion that in all such cases it would be fair to require at least before the way of necessity is lost, that the way which displaces the one of necessity be one as convenient or as valuable to the lands, as was the way of necessity so displaced.

It has been held that where a person has a way of necessity and acquires the servient estate, that then the way of necessity is lost, but if he should afterwards sell the two pieces of property separately, the way of necessity would come into existence again. This is illustrated by the quotation in Wheeler v. Gilsey.[25]

In Buckley v. Combes,[26] it was decided: "That if a person owned close A and a passage of necessity to it over closed B and he purchased closed B and thereby reunited in himself the title to both closes, yet if he after sold close B to one person without reservation and the close A to another person, the purchaser of close A has a right over close B."

Suppose A, the owner of one tract of land, sold to B another tract of land, so situated that B would have a right of way of necessity over the remaining lands of A and B would sell his lands to C, who by reason of owning adjoining lands which reach to a public highway, and C be deprived of his way of necessity over A's lands, and thereafter C should sell the lands so acquired to D who had no way to reach said lands except the old way of necessity or a new one over the lands of C: would D have conveyed to him the right to use the way of necessity over the lands of A?

Here the land is in the same condition and the same necessity exists as when B purchased it from A. If it should be held that D did not acquire such way, then it must be held that he would have a right out over the lands of C, and this would be in a certain sense, taking C's lands for the benefit of A, and give back to A lands which he had sold and for which it is presumed he received a consideration, and yet it would seem if the various decisions of the courts are strictly followed out, this would be just what would happen.

WM. M. ROCKEL.

Springfield, Ohio.,

(25) 35 Howard Pr. N. Y. 145.
(26) 5 Taunt 311.

JUDGMENT—EXEMPT PROPERTY.

KIRK et al. v. MACY.

Appellate Court of Indiana, Division No. 1. March 12, 1913.

101 N. E. 108.

Where a judgment is founded on contract, the judgment debtor, if he is a resident householder and his entire estate, real and personal, does not exceed in value the amount which he is authorized to claim as exempt from sale on such judgment, may before any such sale occurs dispose of such property, and the purchaser or other person to whom it passes will take it free from the lien of the judgment or the lien of the execution on the judgment.

SHEA, J. This action was brought by appellee to enjoin appellants from selling certain real estate described in the complaint to

satisfy a judgment against same, and to quiet her title thereto. The complaint was in one paragraph, to which appelants' separate demurrers were overruled. Answer is general denial. Trial by court. Finding and judgment for appellee, quieting her title to said real estate. The errors assigned are the overruling of appellants' demurrers, and the overruling of their separate motions for a new trial. The complaint alleges that appellee is the owner in fee simple of certain described real estate in Henry county; that in August, 1907, appellant Central Trust & Savings Company, of Newcastle, Ind., obtained a judgment in the Henry circuit court for $436 against Joshua I. Dickinson and John A. Catt; that an execution issued on said judgment, at its instance, which was placed in the hands of appellant Kersey H Kirk, the duly qualified and acting sheriff of Henry county; that under said writ appellant, on May 7, 1910, levied upon the real estate described, as the property of appellee, and advertised the same for sale on said execution; that said judgment has at no time been a lien upon said real estate or any part thereof, or any interest in same; that the sale of the property under execution would create a cloud upon appellee's title which she will be remediless at law to remove. Appellee prays that a temporary injunction be issued to restrain said execution sale and enjoining and restraining appellants from enforcing the judgment against said real estate; that on final hearing the injunction be made perpetual; and that her title to said lands be quieted and forever set at rest as against the claims of said Central Trust & Savings Company. * * * * * * * * * * * *

(2.) The rule in this state is, where a judgment is founded upon contract, the judgment debtor, "if he is a resident householder, and his entire estate, real and personal, of every kind and description whatever, within and without the estate, does not exceed in value the amount which, under the law, he is authorized to claim as exempt from sale on such judgment, he may, before any such sale occurs, sell or dispose of any or all of his property, and the purchaser or person to whom the property passes will take it free from the lien of the judgment, or the lien of any execution that may have issued thereon." Citizens' State Bank of Noblesville et al. v. Harris, supra.

(3) "As to any real estate so disposed of by such judgment debtor, the person to whom it has been conveyed may maintain an action to quiet his title against the lien of the judgment, provided he commences his suit for that purpose before the real estate is sold under the judgment." Citizens' State Bank of Noblesville et al. v Harris, supra; Moss et al v. Jenkins et al., 146 Ind. 589, 45 N. E. 789; King v. Easton, 135 Ind. 353, 35 N. E. 181; Dumbould v. Rowley, 113 Ind. 353, 15 N. E. 463; Barnard v. Brown, 112 Ind. 53, 13 N. E. 401.

(4) It appears from the record that appellant Central Trust & Savings Company obtained the judgment on August 28, 1907. On December 28, 1908, said Catt sold and conveyed the real estate in controversy to appellee. On May 7, 1910, execution was issued and placed in the hands of the sheriff, who proceeded to advertise and sell the land to satisfy the judgment. On May 20, 1910, appellee filed her complaint enjoining said sheriff from the sale. It is clear appellee brought suit to quiet her title before sale of the real estate by the sheriff.

In the case of Moss et al. v. Jenkins, supra, it is said: "The right of the purchaser of real estate which the vendor could have claimed as exempt from sale on execution, to maintain an action commenced before the execution sale to quiet this title to such real estate as against such lien, rests upon equitable principles, and is not declared by the statute. Barnard v. Brown." * * * * * *

Judgment reversed, with instructions to sustain appellants' motion for a new trial.

NOTE.—*Necessity of Dedication to Create a Homestead Exempt From Sale on Execution.*—The rule in Indiana as shown by the instant case presents something of an anomaly. It appears that it is proper to levy upon real estate which has been sold to another as being within the lien of a judgment upon property of the vendor, and title under sheriff's sale will be good. But, if the real estate could have been set apart to defendant in execution, his vendee may put himself in vendor's shoes by bringing a suit to quiet title, provided he does this prior to the sale upon execution. This seems a fair rule so far as estoppel against one standing by is concerned, but why after a vendor, entitled to have property set apart as exempt, fails to do this another may is not clear. This is attempted to be shown in Barnard v. Brown, 112 Ind. 53, 13 N. E. 401, which the other Indiana cases follow. That case shows that the vendee of defendant undertook to schedule the property his vendor owned and ordinarily one would suppose that he might not be able to do this succesfully, and it might even be thought that this was a thing the vendor, truthfully speaking, would prefer not to do, for, if he did, property claimed to be exempt might not be so at all. One may understand better how it may be thought that a purchaser of what the statute says shall not be subject to levy and sale under execution at all should

not have his title disturbed by a creditor of the seller, but where property must be set apart by affirmative act of the owner or it may be sold under execution, it is a little difficult to see how, if that owner allows the opportunity to exempt it to pass, assertion of the right may be by another.

As against the Indiana view, that such a vendee as is above spoken of having an equitable title which he may assert prior to sale under judgment against his vendor, we find it stated in Thompson on Homestead and Exemptions, § 472, that: "Where the existence of the homestead privilege is made to depend upon the act of the debtor in *selecting* the homestead, there are cases which hold that where this act of selection has not been performed, the owner is at liberty to alien his homestead without consent of the wife, although such consent would, after selection be required." Here are cited People v. Plumstead, 2 Mich. 465; Homestead Assn. v. Enslow, 7 S. C. 19; Simmons v. Anderson, 56 Ga. 53. "These and other similar cases go no further, than to assert a rule of general application, namely, that until land is dedicated as a homestead, there are no restraints upon alienation other than those which exist as to property in general." It would seem that, if this is so, a lien should follow its sale to another. A levy under a lien includes every alienable right of defendant, unless it is plainly otherwise provided.

It has been held even, that if a debtor has the option of choosing between two homes, his alternative is lost, if either is seized by creditors. Wapello County v. Brady, 118 Iowa 482, 92 N. W. 717.

The homestead laws do not force any particular land on one entitled to their benefit and generally there is something more required than selection. What is selected must be intended for a home, and many cases have held there must be actual occupancy of such at the time there is attempted levy and sale to be exempt therefrom. For cases, see 21 Cyc., p. 471.

Many state laws require a definite assertion of the debtor to his right of a homestead. Id. 624. And times with reference to sale in judicial process are prescribed. Id. 625. And it must identify the land claimed. Blum v. Carter, 63 Ala. 235; Herrick v. Graves, 16 Wis. 157.

We have searched very industriously for a case like those arising in Indiana, that is to say, that a lien may not effectually follow property, which has not been appraised and set apart as a homestead and that a right not availed of by an occupant to create a homestead exempt from sale may become, after opportunity to assert that right has passed, ground for quieting title in his vendee. Possibly statute may so provide, but, if so, this ought to appear very indubitably.

A Tennessee case is the only one we find where it was claimed that homestead could be claimed by a vendor subsequent to his deed. Hyde v. Butler, 103 Tenn. 289, 52 S. W. 876. The court said: "Finally it is said that Maupin, the execution debtor, was entitled to homestead in this land, which was, and is, worth only $400 or $500, and that, for this reason, the plaintiff cannot maintain this suit. It may be that Maupin was entitled to a homestead in the land before he sold it, and that he would now be protected in the enjoyment of that right if he had not conveyed the land, and still that fact does not affect the plaintiff's title or his right to maintain this suit. Maupin's sale and conveyance divested him of his right of homestead in the land. His deed was unqualified in its terms, and being so, it left in him no right or interest whatsoever. He neither reserved nor sold the homestead right as such, but simply conveyed in fee. By his conveyance, Boyd, his vendee, became the full and absolute owner of every right and interest in the land subject alone to the lien of the Chancery decree." C.

ITEMS OF PROFESSIONAL INTEREST.

PRELIMINARY NOTICE OF MEETING OF THE AMERICAN BAR ASSOCIATION

To the Members of the American Bar Association:

The annual meeting will be held at Montreal, Canada, on September 1st, 2d and 3d, 1913 (Monday, Tuesday and Wednesday.)

The opening address of President Frank B. Kellogg, of Minnesota, will be delivered on Monday, September 1st, at 10 A. M. in the Royal Victoria College (Assembly Hall).

The Right Honorable Richard Burdon Haldane, Viscount of Cloan, Lord High Chancellor of England, will deliver the annual address on Monday, September 1st, at 3. P. M., in the Princess Theatre. The Lord Chancellor will be introduced to the Association by the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, who will preside at this session.

The Honorable Charles J. Doherty, Minister of Justice and Attorney General for Canada, will tender on behalf of the Dominion Government a reception to the Lord High Chancellor and the President and Members of the American Bar Association in the Galleries of the Art Association on Monday evening, September 1st.

The reports of standng and special committees, to be printed and distributed in advance of the meeting, will be presented and discussed at the session of Tuesday, September 2d, at 10 A. M.

There will be a symposium on "The Struggle for Simplification of Legal Procedure' on Tuesday, September 2d, at 8 P. M. The subject will be considered under three sub-topics as follows:

(a) "SOME CAUSES," by Hon. William C. Cook, of Kansas, Judge of the Federal Circuit Court of Appeals, Eighth Circuit;

(b) "LEGAL PROCEDURE AND SOCIAL UNREST," by Hon. N. Charles Burke, of

Maryland, Judge of the Maryland Court of Appeals;

(c) "THE GOAL AND ITS ATTAINMENT," by Hon. William A. Blount, of Florida.

Hon. William Howard Taft, ex-President of the United States, will present a paper (the topic to be hereafter announced) on Wednesday, September 3d, at 10 A. M., in the Royal Victoria College (Assembly Hall).

The annual banquet of the Association will be given on Wednesday, September 3d, at 7 P. M., in the Rose Room of the Windsor Hotel. Hon. Elihu Root, Senator from New York, will preside. Maitre Labori, Batonnier of the Bar of the City of Paris, France, will respond to one of the toasts.

The headquarters of the Association will be at the Windsor Hotel. R. O. McMurtry, Esq. (care of Brown, Montgomery & McMichael, Advocates, Dominion Express Building, Montreal), has kindly consented to take charge of reservations for members and delegates, who should indicate to him the time of arrival, the period for which rooms are desired and whether with or without bath; also how many persons will occupy each room. Mr. McMurtry should likewise be informed as to preference of hotels. Many tourists visit Montreal at this season of the year and hotel reservations, therefore, should be made early.

Committes, Affiliated Bodies, etc.—The Committee on Uniform Judicial Procedure will hold a meeting on Saturday, August 30th, 1913, at 8 P. M., in the New Banquet Room of the Windsor Hotel. The Chief Judge of the court of last resort in each of the States, the senior Circuit Judge of each of the Federal Courts of Appeals, and the Chief Justice of the Court of Appeals of the District of Columbia, have been invited to attend this committee meeting and to participate in the discussion of the report to be submitted to the Association.

The Executive Committee will meet on Saturday, August 30th, at 8 P. M., in President Kellogg's private reception room at the Ritz-Carlton Hotel.

The Commissioners on Uniform State Laws will convene on Tuesday, August 26th, at 10 A. M., in the New Banquet Room of the Windsor Hotel.

The Association of American Law Schools will have its first session on Tuesday, September 2d, 1913, at 3 P. M., in the Ladies' Ordinary of the Windsor Hotel.

The Comparative Law Bureau will hold its annual meeting on Tuesday, September 2d, at 3 P. M., in the New Banquet Room of the Windsor Hotel.

The American Institute of Criminal Law and Criminology will convene on Wednesday, September 3d, at 2:30 P. M., in the New Banquet Room of the Windsor Hotel.

Montreal is only a night's ride by railway from New York or Boston, and only twenty-four hours by rail from Chicago

Further information, including programs of meetings of Section of Legal Education and Section of Patent Law, will be sent in a later announcement.

Members are earnestly requested to post the enclosed card as soon as possible. By so doing they will facilitate greatly the arrangements for the meeting

GEORGE WHITELOCK,
Secretary.

W. THOMAS KEMP,
Assistant Secretary.

1407 Continental Building, Baltimore, Md.

CORRESPONDENCE.

REFORMING THE LAW RELATING TO THE COMMITMENT AND CARE OF INSANE PERSONS.

Editor Central Law Journal:

I take pleasure in sending you under separate enclosure, a complimentary copy of "Summaries of laws relating to the commitment and care of the insane in the United States," prepared by Mr. John Koren and published by the National Committee for Mental Hygiene, thinking that you might consider it of sufficient interest to review in the "Central Law Journal."

A movement such as that undertaken by the National Committee for Mental Hygiene for the betterment of the insane must have the co-operation of the legal profession in order to succeed, for the care and treatment of the insane, quite unlike the care and treatment of other classes of the sick, depend chiefly upon legislation. In the different states, the care of the insane differs so widely that we can find all kinds—from the crude custodial methods of one hundred years ago to the modern hospital methods—in actual employment at the present time. Such differences have not resulted from varying standards for the care of the sick. In all these states we find diphtheria treated by the use of antitoxin, tuberculosis treated by rest in the open air and dependence placed upon the best methods of nursing in the treatment of typhoid fever. The great differences in the kind of treatment afforded the insane depend chiefly upon the kind of laws which each state has enacted and is satisfied with.

In the period in which much of the present

legislation regarding the insane was enacted the insane were regarded as closely akin to the criminal classes and custody rather than treatment was the object in mind. Newer conceptions of the nature of the mental diseases have changed this attitude and new ideals have been only imperfectly reflected in legislation thus far, however, and for this reason there must be a concerted effort on the part of all of those interested, to obtain better laws if standards for care of the insane are to be generally raised in the United States.

Very truly yours,

New York City THOMAS W. SALMON.

[We shall take pleasure in reviewing the volume referred to in the above communication. No phase of our law needs more careful revision than that applicable to the care, custody and judicial determination of the question of insanity. But our friends in the medical profession must be reminded that while insanity is a disease its presence in a certain form deprives a man of two of his greatest rights, the right to contract and the right to his personal liberty. It is difficult to see how it is possible to leave the ultimate determinations of such rights solely to experts. However, we are certain that the legal profession will co-operate in an effort to ameliorate the conditions of those found to be insane and to accept the proven results of scientific research with regard to the detection, classification and cure of all forms of mental derangement. Alienists themselves have not infrequently disagreed in their diagnosis of insanity and they should therefore not be too insistent that their researches are entitled to the same respect as other more conclusive deductions of science. Ed.]

BOOK REVIEWS.

BOYD'S WORKMEN'S COMPENSATION AND INDUSTRIAL INSURANCE, 2 VOLS.

The first of the works on the subjects above indicated, which has come to our table is by Mr. James Harrington Boyd of the Toledo Bar, who has long been engaged in consideration of the subject.

This work contrasts the common law system governing the relation between employer and employee, the many departures therefrom in statutory provision and shows its complete revolution in the laws which are beginning to find statutory recognition among the states, seemingly tardy, as compared with the countries of Europe, especially Germany and England.

There is not much citation of authority in the enforcement of these laws in American cases, but the treatment given the British shows quite an abundance of decision.

The acts of the several states which have passed either a Workmen's Compensation or an Industrial Insurance law are given in full. Also the German code on this subject is set forth in extenso.

The work on the whole should prove of much use both as a compilation and for its discussion of the origin, difference from the common law as to employees, philosophy and advantage of such legislation in respect to modern conditions of employment.

The work is bound in cloth, is handsome in appearance, of good paper and type and comes from the well-known publishing house of The Bobbs-Merrill Company, Indianapolis, 1913.

McILWAINE'S POCKET DIGEST OF TEXAS LAWS. 1912.

A most useful publication for Texas practitioners seems to be the second edition of McIlwaine's Pocket Digest which appeared in 1905. This successor gives full annotation down to the end of 149 S. W. Report, that is to say, November, 1912, and all legislation in force in Texas inclusive of Thirty-second Legislature, at its regular and first called sessions. The importance of this fact is better understood by Texas lawyers than we can state.

Of course, there is an enlargement of the 1905 Pocket Digest, and this is estimated at more than 20 per cent. It contains "in full those portions of the statutes which the lawyer may need in his daily practice." To have all of this in one's pocket, as the advance in the publisher's art now so well enables, gives little excuse for one entering legal jousts not being at all times armed cap a pie in Texas.

The edition is very attractive in appearance, with its flexible green leather binding and its thin-leaved fullness, impressed with readily-readable type for sections and their annotation.

This excellent volume contains 1379 pages and comes from Vernon Law Book Company, Kansas City, Mo.

HUMOR OF THE LAW.

"Has a man," asked a prisoner of a magistrate, "any right to commit a nuisance?" "No, sir; not even the mayor." "Then, sir, I claim my liberty. I was arrested as a nuisance, and, as no one has a right to commit me, I move for a nonsuit."

Smith is a young New York lawyer, clever in many ways, but very forgetful. He was recently sent to St. Louis to interview an important client in regard to a case then pending in the Missouri courts. Later the head of his firm received this telegram from St. Louis:

"Have forgotten name of client. Please wire at once."

This was the reply sent from New York:

"Client's name Jenkins. Your name Smith."—Everybody's.

Once Judge William M. Conley, of Madera, California, was trying a case wherein a woman sought to recover a diamond ring she had in fonder moments given to a gentleman friend, says the Saturday Evening Post:

"When you gave this man this ring didn't you think him the best ever?" asked the judge.

The woman blushed and hesitated, and finally admitted she did.

"No, be honest," continued the judge: "didn't you think him the handsomest man you had ever known?"

The woman blushed again and then leaned over and whispered something to the judge. Presently he instructed the jury to find for her.

Everybody wondered what it was the witness had told the judge. The judge wouldn't tell, but finally a stenographer divulged the secret. What she whispered was: "Not half so handsome as you are, judge."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Alteration of Instruments**—Original Contract.—An alteration of the interest rate in a note, with intent to defraud, will not prevent the enforcement of the original contract, if capable of execution.—Shaw v. Probasco, Ga., 77 S. E. 577.

2. **Bailment**—Burden of Proof.—Where a bailor proves delivery of property to a bailee and the bailee's failure or refusal to return the same, the burden is then on the bailee to relieve himself from liability by showing that the property was not lost through his negligence.—Bagley v. Brack, Tex., 154 S. W. 247.

3. **Bankruptcy**—Conditional Sale.—Where a stock of goods was sold pursuant to a conditional sale contract, it could not be taken by the buyer's trustee in bankruptcy to the prejudice of the seller's claim.—Andre v. Murray, Ind., 101 N. E. 81.

4.——Diversity of Citizenship.—The consent of defendant provided for by Bankrupt Act July 1, 1898, governing the jurisdiction of suits by trustee in bankruptcy, did not confer jurisdiction on the federal Circuit Courts which they would not have because of diverse citizenship and amount in controversy, or by reason of a cause of action arising under the Constitution or laws of the United States.—Lovell v. Isidore Newman & Sons, 33 Sup. Ct. Rep. 375.

5.——Exemption.—That a creditor holds the note of his debtor, which contains a waiver of exemption rights, does not give the creditor any lien, equitable or otherwise, on property of the debtor which he has scheduled in bankruptcy, and asked that it be set apart as exempt.—Coffey v. Mitchell, Ga., 77 S. E. 561.

6.——Factors.—Where flour was shipped to the bankrupts for sale on commission, and they never promised to pay or assume any personal responsibility therefor, the flour before sale and the proceeds thereafter remained the property of the claimants.—In re Larkin & Metcalf, U. S. D. C., 202 Fed. 572.

7.——Fraudulent Transfer.—Knowledge that money loaned to an insolvent firm on security of book accounts was to be used to pay an existing debt does not charge the transferee with knowledge of any intent of the borrower to defraud so as to entitle the trustee in bankruptcy to set the transfer aside as fraudulent.—Van Iderstine v. National Discount Co., 33 Sup. Ct. Rep. 343.

8.——General Assignment.—The making of a general assignment for the benefit of creditors constitutes an act of bankruptcy without regard to the solvency or insolvency of the debtor.—In re Farthing, U. S. D. C., 202 Fed. 557.

9.——Partnership.—In the marshaling of assets of a bankrupt, a partner, which is also a partnership and insolvent, is to be treated as an individual, and its assets applied first to the payment of its own debts.—In re Knowlton & Co., C. C. A., 202 Fed. 480.

10.——Provable Debt.—Debts provable under Bankrupt Act include only such as existed at the time of the filing of the petition in bankruptcy.—Zavelo v. Reeves, 33 Sup. Ct. Rep. 365.

11. **Banks and Banking**—Aiding and Abetting.—The president of a national bank may be properly convicted of aiding and abetting the cashier in falsifying reports to the Comptroller of the Currency.—Kettenbach v. United States, C. C. A., 202 Fed. 377.

12.——Burden of Proof.—Where a bank president obtained a loan in order to tide over the bank's difficulties, the burden was on him to clearly prove the nature and character of his outlays for that purpose, in order to recover the same from the bank's receiver.—Elliott v. Peet, C. C. A., 202 Fed. 434.

13.——Deposit.—While a bank can set off a matured debt due it by a depositor against a general deposit, the exercise of the right is optional; and if the depositor dies, and the appraisers set apart the amount due by the bank for a year's support to his widow, it is too late for the bank to exercise its right of set-off.—Luthersville Banking Co. v. Hopkins, Ga., 77 S. E. 589.

14.——Estoppel.—A bank, whose cashier received a deposit after it was insolvent, was charged with the cashier's knowledge of such insolvency, although due to his and the assistant cashier's defalcations.—Pennington v. Third Nat. Bank of Columbus, Ga., Va., 77 S. E. 455.

15.——Forgery.—The owner of a check, whose manager authorized to receive it forged his indorsement, and absconded with the money, and who has been charged with the amount as a payment by the maker, has a cause of action over against the bank which accepted the check, and paid the amount to its manager.—Morrison v. Chapman, 140 N. Y. Supp. 700.

16. **Bills and Notes**—Negotiability.—A note not negotiable because not payable to order or to bearer does not import consideration.—Kinsella v. Lockwood, 140 N. Y. Supp. 513.

17.——Negotiability.—An order by a subcontractor on the contractor, payable to a materialman, to be charged to the account of the sub-

contractor, held not an assignment, but a non-negotiable bill of exchange.—Windsor Cement Co. v. Thompson, Conn., 86 Atl. 1.

18.——Rescission.—In an action on a note, where the maker agreed in certain cases to return worthless stock, and the payee absconded, the maker's return of the stock to the master is a sufficient compliance with the agreement to support his rescission.—Berenson v. Conant, Mass., 101 N. E. 60.

19. **Brokers**—Reasonable Time.—Where no time is mentioned, a broker is entitled to a reasonable time to produce a purchaser; but if the time is fixed it becomes of the essence.—Barney v. Yazoo Delta Land Co., Ind., 101 N. E. 96.

20. **Cancellation of Instruments**—Scienter.—Though, to recover at law for fraud, plaintiff must show representation, falsity, scienter, deception, and injury, it is not necessary, to entitle one to relief in equity, to show scienter.—Severson v. Kock, Iowa, 140 N. W. 220.

21. **Carriers of Goods**—Agency.—A railroad station agent has power to contract that the railroad will furnish cars at a named place and date for the transportation of freight so as to bind the company.—Pecos & N. T. Ry. Co. v. Bishop, Tex., 154 S. W. 305.

22.——Agreed Valuation.—Valuation named in a shipping contract signed by the shipper is as much an agreed valuation within Carmack Amendment as if the shipper had stated the value on inquiry.—Missouri, K. & T. R. Co. v. Harriman Bros., 33 Sup. Ct. Rep. 397.

23.——Conversion.—A conversion by a common carrier or other bailee implies some wrongful disposition or withholding of the property, mere nonfeasance, or failure to perform a duty imposed by contract or implied by law not constituting a conversion; and hence a misdelivery of freight by a carrier, but not mere nondelivery may constitute a conversion.—Vandalia R. R. Co., v. Upson Nut Co., Ind., 101 N. E. 114.

24.——Limitation of Liability.—A shipper is bound by a provision in a bill of lading providing that, if the shipper does not state the value of a shipment in the bill of lading, the carrier will not be liable for more than $50, although he was ignorant of its presence.—Pacific Express Co. v. Ross, Tex., 154 S. W. 340.

25.——Limitation of Liability.—A limitation of liability to a valuation agreed upon to determine which of two rates shall apply to a particular shipment is not forbidden by the provision in Carmack Amendment.—Kansas City Southern R. Co. v. Carl, 33 Sup. Ct. Rep. 391.

26. **Carriers of Live Stock**—Burden of Proof.—Where mules were received by the original carrier in good condition and delivered at destination in a damaged condition, in absence of a showing that they were injured by their inherent viciousness, an initial carrier was liable for injuries in transportation, irrespective of whether they were injured on its road—Kansas City Southern Ry. Co. v. Mixon-McClintock Co., Ark., 154 S. W. 205.

27. **Carriers of Passengers**—Boarding a Car.—A passenger may board a street car at the places designated by the railway company as stopping points, and at such other points as the railway may stop its cars on the public streets.—Moffitt v. Connecticut Co., Conn., 86 Atl. 16.

28. **Confusion of Goods**—Trespass.—Where a trespasser sold turpentine and resin to defendant, some of which the trespasser had taken from an unpatented homestead entry, the government was entitled to recover the value of the whole mass, unless that taken from the homestead was determinable.—Union Naval Stores Co. v. United States, C. C. A. 202 Fed. 491.

29. **Contracts**—Breach.—Though the performance of an executory contract is not yet due, a renunciation thereof is a complete breach entitling the injured party to sue at once.—Wendt v. Ismert-Hincke Milling Co., Ark., 154 S. W. 194.

30.——Comity.—A contract valid at place of performance, another state, will be enforced in Virginia, though a similar contract made and to be performed in Virginia would not be upheld.—R. S. Oglesby Co. v. Bank of New York, Va., 77 S. E. 468.

31.——Fraud.—Where an instrument is fraudulently read to a party, or another fraudulently substituted in its place incorrectly, or where without being read, its terms are fraudulently misrepresented, he being unable to read, or otherwise without laches, he is not bound thereby.—Shores-Mueller Co. v. Lonning, Iowa, 140 N. W. 197.

32.——Pleading.—A party pleading a breach of warranty as a cause of action or defense must allege the character and extent of the warranty and the nature and particulars of the breach.—Barber Asphalt Paving Co. v. City of Indianapolis, Ind., 101 N. E. 31.

33. **Corporations**—Acceptance of Benefits.—One may not obtain benefits under an ultra vires contract executed by a corporation, and afterwards repudiate the contract.—City of St. Louis v. St. Louis, I. M. & S. Ry. Co., Mo., 154 S. W. 55.

34.——Agency.—Where the secretary of defendant corporation issued spurious stock to himself and obtained the signature of the corporation's president thereto on misrepresentation, and pledged the certificate to plaintiff as security for a loan, the corporation was liable to plaintiff for the amount of the loan.—Davey v. Newell-Morse Royalty Co., Mo., 154 S. W. 147.

35.——Agency.—The president and treasurer of a corporation had no implied authority where property purchased was retaken by the conditional vendor to waive the corporation's claim to the surplus realized upon a resale above the amount due on the purchase price.—Leonard v. Montague, 140 N. Y. Supp. 562.

36.——Records.—Where the records of a corporation do not show that the board of directors authorized a certain agent to execute a mortgage, other evidence was competent to show such fact as against such corporation and its privies.—Miller v. Bellamore Armored Car & Equipment Co., Conn., 86 Atl. 13.

37.——Ultra Vires.—The rule that ultra vires is not a defense to an executed transaction applies only when the contract is fully and completely performed on both sides, and does not apply if relief can be granted independent of the contract, or a new, further and independent consideration subsists to support the transaction sought to be enforced.—City of Santa Cruz v. Wykes, C. C. A., 202 Fed. 357.

38. **Courts**—Bankruptcy.—An appeal will not lie to the federal Supreme Court from a Circuit Court of Appeals which affirmed a judgment of the bankruptcy court, refusing a discharge, but the only appeal contemplated under Act July 1, 1898, is from the bankruptcy court to the Circuit Court of Appeals.—James v. Stone & Co., 33 Sup. Ct. Rep. 351.

39.——Federal Question.—The federal Supreme Court has jurisdiction of a writ of error to a state court to review a decision in which both plaintiff and defendant assert rights under a homestead entry, and the federal question was passed on by the state court.—Wadkins v. Producer Oil Co., 33 Sup. Ct. Rep. 380.

40. **Criminal Law**—Public Trial.—Accused was not deprived of a public trial by an order excluding spectators from the courtroom, where the court officers, members of the bar, and persons in any manner connected with the case were permitted to remain.—Reagan v. United States, C. C. A., 202 Fed. 488.

41. **Damages**—Interest.—Where a tort consists in the destruction of property, the jury may, in their discretion, allow interest on the value of the property from the date of its destruction, in addition to its actual value.—Harper v. Atlantic Coast Line R. Co., N. C., 77 S. E. 415.

42.——Interest.—Interest is not allowed in actions of tort in a federal court as a matter of right, but its allowance as a part of plaintiff's damages is discretionary with the jury.—White v. United States, C. C. A., 202 Fed. 501.

43. **Deeds**—After-Acquired Property.—A conveyance of a tenant in common's undivided interest, with covenants of warranty did not pass the interest subsequently acquired as heir of one of the other tenants in common who thereafter died.—Clements v. T. S. Faulk & Co., Ala., 61 So. 264.

44.——Confidential Relation.—Where the grantee in a deed stood in a fiduciary relation to the grantor, the burden was on him, in an attack on the deed, to show absence of fraud or undue influence in its procurement.—Cornet v. Cornet, Mo., 154 S. W. 121.

45.——Delivery.—In the absence of proof, there is a presumption that a deed is delivered, if at all, at the date of its execution.—Ford v. Gale, 140 N. Y. Supp. 541.

46.——Duress.—Duress exercised by a husband over his wife to procure her to sign a deed will not vitiate it if the grantee has no knowledge thereof.—Harper v. McGoogan, Ark., 154 S. W. 187.

47. **Dismissal and Nonsuit**—Equity.—Under the common-law practice, a plaintiff, in an action of law, could dismiss at any time before verdict; but a dismissal was not allowed in equity, where defendant would be injured or the dismissal would be inequitable.—Moore-Mansfield Const. Co. v. Marion, Bluffton & Eastern Traction Co., Ind., 101 N. E. 15.

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48. **Divorce**—Alimony.—Where both the husband and wife asked a divorce on the ground of abandonment by the other, a judgment of divorce improperly granted to the husband could not be reversed, but the improper denial of alimony to the wife could be corrected on appeal.—White v. White, Ky., 154 S. W. 33.

49.——Service by Publication.—The court of another state cannot dissolve the marriage of a citizen of New York, domiciled and residing here throughout the pendency of the divorce action, without a voluntary appearance therein, and without personal process served on him in such state.—Sterry v. Sterry, 140 N. Y. Supp. 716.

50. **Election of Remedies**—Estoppel.—The bringing of an action at law by one partner to recover damage for the other's breach of contract by a declaration of dissolution followed by exclusion from possession is not such an election as bars a right to sue to obtain a decree of dissolution and an accounting.—Zimmerman v. Harding, 33 Sup. Ct. Rep. 387.

51. **Equity**—Multifariousness.—The objection of multifariousness is one as to which there is no inflexible rule; and the question must be determined largely by the circumstances of the particular case.—Lovejoy v. Bailey, Mass., 101 N. E. 63.

52.——Subrogation.—One seeking subrogation must come into court with clean hands.—Galliland v. Williams, Ala., 61 So. 291.

53.——Unclean Hands.—Under the equitable doctrine of unclean hands, a reconveyance of land to a husband, who conveyed in order to defraud his wife by obtaining a divorce and then procuring a reconveyance, would not be compelled.—Stillwell v. Bell, Mo., 154 S. W. 85.

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55.——Inspection of Papers.—Where a paper is called for by one party, produced by the other party, and inspected by the party calling for it, it thereby becomes evidence for both parties.—The Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co., Md., 86 Atl. 38.

56. **Exemptions**—Creditors.—An owner, all of whose property does not exceed his right to exemption, held entitled to dispose of same to a purchaser who would take the property free from the lien of the judgment or the lien of the execution on the judgment.—Kirk v. Macy, Ind., 101 N. E. 108.

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59. **Fraudulent Conveyances**—Burden of Proof.—Where a settlement is made by a debt-

or for the benefit of his wife, in consideration of her release of dower in the balance of his property, the burden is on a creditor seeking to set aside such conveyance to show that the settlement was so excessive as to raise a presumption of fraud.—Savings Bank of Richmond v. Todd, Va., 77 S. E. 446.

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61. **Frauds, Statute of**—Mortgage.—A mortgage executed pursuant to a prior parol agreement to answer for the debt of another is not void under the statute of frauds.—Minchender v. Henderson, Ala., 61 So. 246.

62.——Performance.—An agreement by the seller of stock to repurchase it at the option of the buyer is part of the original contract of sale; and, where the stock is paid for and delivered, the contract is sufficiently performed to be enforceable under the statute of frauds, but not where the promise to repurchase was made by a third person.—Korrer v. Madden, Wis., 140 N. W. 325.

63. **Gifts**—Causa Mortis.—A statement by deceased to her son about five years before her death and without thought of impending death that what she left would be his was insufficient to constitute a gift causa mortis.—In re Elliott's Estate, Iowa, 140 N. W. 200.

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66. **Homicide**—Communicated Threats.—The communication to accused of threats by the deceased does not warrant accused in commencing an attack until the deceased has committed some overt act or made some hostile demonstration, though he may act upon a slighter hostile demonstration than if there had been no threats.—Beasley v. State, Ala., 61 So. 259.

67. **Husband and Wife**—Burden of Proof.—Where a husband purchased land with his wife's money, taking the title in his own name, the burden was on those claiming under him to show that she expressly assented in writing to such disposition of her money, and was not on her to show that she did not so assent.—Fogle v. Pindell, Mo., 154 S. W. 81.

68.——Necessaries.—A husband may be liable for necessaries sold to his wife, unless he has supplied her with the articles bought or with money to pay for them, or has given notice that purchases made were on her credit, and not his.—Wickstrom v. Peck, 140 N. Y. Supp. 570.

69.——Separate Estate.—Where title to land occupied by a husband and wife is perfected by adverse possession after his death, the land becomes the wife's separate estate.—Cook v. Houston Oil Co. of Texas, Tex., 154 S. W. 279.

70. **Insurance**—Change of Title.—The execution of a mortgage on insured property does not constitute a change of title or change of interest, within a provision for forfeiture in such event.—Seyler v. British America Assur. Co., W. Va., 77 S. E. 555.

71.——Indemnity.—Plaintiff in a policy indemnifying it for personal injuries to parties on its premises, may recover in an action on the policy the expenses in defending the action for personal injuries.—Harbor & Suburban Bldg. & Savings Ass'n v. Employers' Liability Assur. Corporation, Limited, of London, Eng., 140 N. Y. Supp. 717.

72.——Incontestability.—A life insurance policy, which provides that it shall be incontestible after a specified time, cannot be contested after that time on any ground not excepted therein.—Harris v. Security Life Ins. Co. of America, Mo., 154 S. W. 68.

73.——Vacancy.—An insured building was not vacant at the time of a fire merely because the occupant was temporarily absent at such time.—Walrod v. Des Moines Fire Ins. Co., Iowa., 140 N. W. 218.

74. **Judgments**—Consent.—Judgments by consent are equally effective as res adjudicata as those rendered on a trial of the issues; neither being subject to collateral attack for errors or irregularities in their entry or rendition.—Lewis v. St. Louis, I. M. & S. Ry. Co., Ark., 154 S. W. 198.

75. **Libel and Slander**—Secret Intention.—Where defendant, in unequivocal language, charged plaintiff with being a thief and a keeper of a rendezvous for thieves, he could not show a secret intention to merely abuse plaintiff and not charge him with larceny.—Shepard v. Brewer, Mo., 154 S. W. 116.

76. **Life Estates**—Taxes.—The taxes on real estate should be paid by the life tenant during her occupancy thereof, and her failure to do so creates a lien in the first instance upon her interest in the real estate.—Figgins v. Figgins, Ind., 101 N. E. 110.

77. **Logs and Logging**—Timber Reservation.—Where timber is reserved in a conveyance of land, no time being fixed for removal, it must be removed within a reasonable time; and a delay of 20 years bars the right of entry, though not devesting the title to the timber.—Ward v. Moore, Ala., 61 So. 303.

78. **Master and Servant**—Evidence.—A machine's unexplained automatic starting into motion, when it ought to remain still, is evidence of a defect or want of repair.—Cook v. Newhall, Mass., 101 N. E. 72.

79.——Fellow Servant.—That the negligence of a fellow servant concurred with the master's negligence in failing to properly guard a revolving shaft in the mill in causing plaintiff's injury would not preclude a recovery against the master.—Smith v. Winnebago Realty Co., Wis., 140 N. W. 327.

80.——Master's Direction.—Where a master requires an implement to be used in a dangerous manner, under dangerous conditions, and in a manner more dangerous than the usual method, he may be guilty of negligence in so doing.—Thomsen v. Jobst, Neb., 140 N. W. 269.

81. **Mechanics' Liens**—Machinery.—Where machinery designed, manufactured, and sold for a saw mill was so set up therein as to become a part of the realty, plaintiff did not waive its right to a mechanic's lien by reserving title until the machinery was paid for.—M. A. Phelps Lumber Co. v. McDonough Mfg. Co., C. C. A., 202 Fed. 445.

82.——Pleading.—Where material is purchased by the owner of the structure into which it is to be placed, it is not necessary, in proceedings to enforce liens against the structure, to allege its actual use therein, though such an allegation is required in case of material furnished to a contractor.—Fry v. P. Bannon Sewer Pipe Co., Ind., 101 N. E. 10.

83. **Mines and Minerals**—Oil Lease.—Oil and gas lessees are not the owners of the oil and gas until reduced to possession, but only have the exclusive right to mine therefor.—Campbell v. Smith, Ind., 101 N. E. 89.

84. **Monopolies**—Labor Unions.—In their relations to their respective members, labor unions cannot undertake to require, by oath, obligation, constitution, by-law, or rule, a surrender by such members of their individual freedom of action, and, when they seek to do so, they become an illegal combination in restraint of trade.—Hitchman Coal & Coke Co. v. Mitchell, U. S. D. C., 202 Fed. 512.

85. **Names**—Idem Sonans.—The names "Heberling" and "Herberling" are not idem sonans, so that a service by publication against the latter, instead of the former, was insufficient.—Heberling v. Moudy, Mo., 154 S. W. 65.

86. **Navigable Waters**—Filled-in-Land.—That lands originally under water have been filled in does not change their status as lands under

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87. **Negligence**—Evidence.—One's negligence on a particular occasion cannot be proved by showing negligence on another ocasion, nor can his freedom from negligence on one occasion be shown by proof of his due care on other occasions.—Moffit v. Connecticut Co., Conn., 86 Atl. 16.

88.——Proximate Cause.—A proximate cause of an accident is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the event, and without which the injury would not have happened, and from which it could reasonably, and should, have been anticipated that the injury would result as a natural and probable consequence under the circumstances.—Kirby Lumber Co. v. Cunnigham, Tex., 154 S. W. 288.

89.——Res Ipsa Loquitur.—The doctrine of res ipsa loquitur arises only in the absence of explanation, as an inference that a certain event does not happen except by negligence, and has no application where every circumstance and fact are in evidence.—Cook v. Newhall, Mass., 101 N. E. 72.

90. **Partition**—Description.—In order to sustain a judgment in partition, the description of the land must be sufficiently definite to enable the sheriff of the county in which the land is located to locate the land therefrom.—Hector v. Horrell, Mo., 154 S. W. 96.

91.——Parties.—The statutory action for partition requires the inclusion of the interest of every person who, upon any contingency, may be or become entitled to any beneficial interest in the premises.—Fogle v. Pindell, Mo., 154 S. W. 81.

92. **Partnership**—Fraud.—Partners causing the foreclosure of a mortgage on firm property, for the purpose of defrauding a co-partner, were liable to such co-partner, though the mortgagee was an innocent tool in the execution of the fraudulent device.—Lovejoy v. Bailey, Mass., 101 N. E. 63.

93. **Physicans and Surgeons**—Burden of Proof.—That death of a patient occurred during the administering to her by a physician of an anesthetic will not alone support a recovery for malpractice; plaintiff having the burden of proving negligence.—Spain v. Burch, Mo., 154 S. W. 172.

94. **Principal and Surety**—Release of Surety.—Sureties are released by the addition of another name as surety only where such name is added after execution and delivery of the bond and its acceptance by the obligee.—Fry v. P. Bannon Sewer Pipe Co., Ind., 101 N. E. 10.

95.——Release of Surety.—Where tenants, upon discovering that they would be unable to plant in tobacco the amount of the land agreed upon, secured permission from plaintiffs to plant part in corn, this did not release a surety on the lease.—Mudd v. Shroader, Ky., 154 S. W. 21.

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97. **Receivers**—Corporation.—A corporation will not be liable for injuries to an employee while the property was in the hands of a federal receiver, unless the receivership has been terminated and the property returned to the corporation with such liability imposed upon it by the decree as a condition to receiving it, or it has assumed such liability, or the revenues were expended by the receiver in betterments.—Kirby Lumber Co. v. Cunningham, Tex., 154 S. W. 288.

98. **Sales**—Breach of Contract.—The repudiation of a contract of sale by or before the arrival of the time for performance was not a breach thereof, where it was not acquiesced in by the seller, so that the seller was bound to tender a performance at the time of delivery.—Home Pattern Co. v. W. W. Mertz Co., Conn., 86 Atl. 19.

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100.——Bulk Sale.—A conditional sale of a stock of goods to be sold at retail authorizes the buyer to sell the same in the regular course of trade, but not in bulk.—Andre v. Murray, Ind., 101 N. E. 81.

101.——Nominal Damages.—On a seller's breach of contract to deliver, the buyer is entitled to recover nominal damages, if no substantial damages be shown.—Berbarry v. Tombacher & Banor, N. C., 77 S. E. 412.

102.——Notice.—Whatever is sufficient to direct the attention of a purchaser to prior rights and equities of third persons, so as to put him on inquiry to ascertain their nature, will operate as notice to him.—Diehl v. Middle States Loan, Bldg. & Const. Co., W. Va., 77 S. E. 549.

103.——Waiver.—A person induced to contract for a stock of goods on the basis of the invoice price, by false representations relative to the amount, held not to have waived the fraud by continuing with and completing the invoice after being told by the seller that the stock greatly exceeded the amount as represented.—Dyer v. Cowden, Mo., 154 S. W. 156.

104.——Waiver.—The giving of a note on March 17th for the price of a mechanical device installed early the previous fall, without complaint of any failure to come up to the seller's warranty as to what it would accomplish, held a waiver of the warranty.—The Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co., Md., 86 Atl. 38.

105. **Trade Unions**—Agency.—The officers of a labor union in executing an agreement with a railroad company as to pay and regulations of employment of engineers are not agents of a member of the union merely because he is such, so that no rights accrue to him thereunder by reason of its execution by them.—Hudson v. Cincinnati, N. O. & T. P. Ry. Co., Ky., 154 S. W. 47.

106 **Trusts**—Spendthrift Trust.—A deed of trust creates a spendthrift with no vested interests, where the trustees may pay the income for the life of H. and wife to them or either or the survivor or their issue, or any of them, in their discretion.—Leverett v. Barnwell, Mass., 101 N. E. 75.

107. **Waters and Water Courses**—Prescription.—An open, notorious, exclusive, and adverse possession and use of drains carrying water into a natural water course for 30 years, with the right to flow water through them across plaintiff's land during that time, shows an easement by prescription.—Seigmund v. Tyner, Ind., 101 N. E. 20.

108. **Wills**—Construction.—Where the words at the beginning of a will clearly show an intention of the testator to devise the entire estate absolutely to the first donee, the estate will not be cut down by subsequent ambiguous words.—Cornet v. Cornet, Mo., 154 S. W. 121.

109.——Construction.—Where, after a construction of the entire will, there is doubt whether a lesser estate was intended to be created, the will will be construed as passing a fee.—Parrish v. Burkley, Ky., 154 S. W. 11.

110.——Legacy.—A pecuniary legacy is primarily payable from the personal estate.—In re Lane's Will, 140 N. Y. Supp. 602.

111.——Legacy.—An intention to make a legacy of stock specific necessarily includes an intent to render it subject to ademption in the event of the specific security being converted to cash.—Mecum v. Stoughton, N. J., 86 Atl. 52.

112.——Remainder.—Words postponing a remainder are presumed to relate to the beginning of its enjoyment, and not to the time of its vesting.—Alsman v. Walters, Ind., 101 N. E. 117.

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